

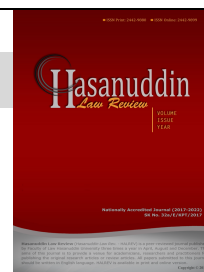
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The Arrangement of Investment Policy for the Protection of Indigenous Peoples' Rights

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ABSTRACT

The investment law policies have a positive influence on the interests and welfare of all Indonesian people. However, many legal problems arise due to overlapping regulations both at the central and regional government levels, and also in term of the implementation of decentralization. The results show that the arrangement of investment policy in West Papua against the recognition and respect for Papua indigenous peoples' rights are still limited to universal policies. Nationally, the policy has not clearly revealed how the form of recognition and respect for the rights of indigenous peoples and/or Papuan indigenous peoples rights related to the presence of investments in West Papua. On a regional scale, the provincial government policy in the form of regional regulations, only covers the scope of investment in West Papua, but does not fully explain how the form of recognition and respect for Papua indigenous peoples related to investment. Hence, related with the alignment of Papua indigenous peoples' rights in the field of ideal investment arrangements in West Papua was began with the concept of Bottom-up Development Planning, by involving indigenous peoples as a whole. This concept is based on the Optimum Suitable Yield (OSY) where the amount of natural resources that can be exploited must be based on calculations from various perspectives such as biology, economics, and even socio-political perspectives.

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1. Introduction

Investment is an economic growth-driver source to ensure the sustainability of sustainable development in globalization era. It can come from domestic and foreign investments.¹ Papua becomes an investment target because it has abundant natural

¹ Acep Rohendi, (2014) "Prinsip Liberalisasi Perdagangan World Trade Organization (WTO) dalam Pembaharuan Hukum Investasi di Indonesia", *Padjadjaran Jurnal Ilmu Hukum*, 1 (2), 386-406.

wealth and potential growth in its domestic market.² However, this attraction will not be valuable if internal conditions of a country such as economic stability, state politics, and law enforcement do not function properly.³ In order to attract investors to Indonesia, the government is trying to improve regulations in the field of investment law that began during the New Order, the Reformation period until now.⁴

In Papua, the growth and development of investment is growing so rapidly although there are still events that damage the Papuan indigenous peoples' rights. The investment policies and activities are based only on large-private capital, modern technology and organizations, which in reality have ignored the Papuan indigenous peoples' rights, restrict and eliminate access to their living space, horizontal conflicts and disharmony, violence and human rights violations, and extensive environmental damage. In fact, investment and violence emerge altogether in Papua territory.⁵

Considering that investment becomes an essential factor in the economic development of a country, the Indonesian government as the organizer of the country is required to make investment law policies so that it can have a positive influence on the interests and welfare of all Indonesian people. The obligation of a country to regulate investment law policies is required because the character of investment that has economic and non-economic impacts, and affects many aspects such as land, labor, capital, taxation, a sense of community justice and national security.⁶ In addition, many legal problems arise due to overlapping regulations both at the central and regional government levels,⁷ and also in terms of the implementation of decentralization.⁸

A case of rejection for mining companies in various regions in Indonesia is also caused by the abuse of the authority of companies in exploiting so that violates the territorial boundaries of indigenous peoples.⁹ The disregard for the rights of indigenous peoples in the contract of work certainly raises legal issues related to the exploration activities of indigenous peoples' rights in Indonesia.¹⁰

The problems and challenges of territory development and investment faced by West Papua province in the next 20 years will determine the agenda, targets and strategies for regional development which must also be cross-sector and cross-coordination. Now, a problem that has not been resolved related to the increase of investment in West Papua is low legal certainty. It is reflected in the number of overlapping policies between the central and regional governments and also inter-sectors. Improper implementation of decentralization program causing the regional authority in investment policies is

² J. Thomas Lindblad, (2015) "Foreign Direct Investment in Indonesia: Fifty years of Discourse", *Bulletin of Indonesian Economic Studies*, 51 (2), pp. 217-237.

³ Chandra Kurniawan, (2016) "Pengaruh Investasi Terhadap Perekonomian Indonesia", *Jurnal Media Wahana Ekonomika* 12 (4), 1-9; See also Thomas Lindblad, *ibid*.

⁴ J. Thomas Lindblad, *Op.Cit.*

⁵ Greg Poulgrein, 2015. *The Incumbus of Intervention Conflicting Indonesia Strategies Of John F Kennedy and Allen Dulles*, Petaling Jaya, Malaysia: SIRD

⁶ Ade Maman Suherman, *Aspek Hukum Dalam Ekonomi Global*, Ghalia Indonesia Baru, Bogor, 2002, p. 26.

⁷ Fifi Junita, "The Foreign Mining Investment Regime in Indonesia: Regulatory Risk Under Resource Nationalism Policy and How International Investment Treaties Provide Protection", *Journal of Energy & Natural Resources Law* (2015) 33(3), 241-265.

⁸ Asian Development Bank, *Op.Cit.*, pp. 10-11.

⁹ Jemmy Sondakh, "Bagi Hasil Investasi Sebagai hak Masyarakat Adat Pada Wilayah Pertambangan di Era Otonomi Daerah", *Jurnal Hukum Unsrat* (2017) 23 (8), pp. 27-46.

¹⁰ Julianto J.J. Kalalo, Aminuddin Salle, A. Suriyaman Mustari Pide, Sri Susyanti Nur. (2017). Legal Policy of Customary Right Protection: A Case Study in Border Area of Southern Papua, *Journal of Law, Policy and Globalization*, Vol 63.

unclear.¹¹ In the context of Papuan, the investment law policy should be reviewed in order to realize public welfare.

2. Method

The research is a normative and empirical legal research. It tries to look normatively and sociologically the investment law policies in the Special Autonomy Region of West Papua related to the recognition and respect for indigenous peoples. It was carried out in West Papua province; it is centered on several districts and indigenous peoples as subject of research such as Sorong, Teluk Bintuni, and Tambraw. The populations of research are all stakeholders involved in investment in West Papua. The sample is collected by purposive sampling.

3. Investment Policy in West Papua vs the Interest of Papua Indigenous Peoples' Rights

The goal of the creation of a State government is to advance public welfare. The mandate has been elaborated in Article 33 of the 1945 Constitution and as a constitutional mandate that underlies the formation of all laws and regulations in the field of economic. The constitution mandates that national economic development must be based on democratic principles that can create the realization of economic sovereignty.

In this regard, investment must be part of the implementation of the national economy and it is placed as an effort to increase national economic growth, create vocation, enhance sustainable economic development, increase national technological capacity and capabilities, encourage populist economic development, and realize community welfare in a competitive economic system. The objective of investment management can only be achieved if the supporting factors that hinder the investment climate can be overcome, among others through improving coordination between agencies of the central and regional governments, creating efficient bureaucracy, legal certainty in the field of investment, high-economic costs that are highly competitive, and conducive business climate in the field of employment and business security.

Facing changes in the global economy and participation of Indonesia in various international collaborations is important to create an investment climate that is conducive, promotive, provides legal certainty, fairness, and efficient while considering the national economic interests. A State participation in all sectors of life is to create a welfare State in creating a just and prosperous society, both spiritually and materially.¹² Investment arrangement with a paradigm of local government decentralization is an obstacle in creating conducive investment climate.

Investment is a means to accelerate regional economic growth and improve people welfare in the region. Therefore, the arrangement of investment must be really oriented towards increasing economic growth and the people welfare in the region. It is a local authority to manage the potential of natural resources owned by the region to improve

¹¹ The Regional Development Planning and Investment (RPWI - Rencana Pengembangan Wilayah dan Investasi (RPWI)) of West Papua; the Document of General Plan as Planning Document for the next 20 year (2007- 2026)

¹² Jeddawi explains that a region is given an authority *to legislate, to execute and to develop* region in accordance with the interest and its regional potency and aspiration of community. Jeddawi *Investasi di dalam Era Otonomi Daerah: Problematika dan Tantangannya*. Gramedia: Jakarta. 2005. p. 26

welfare.¹³ Regional investment is a means of accelerating regional growth and improving peoples' welfare. In an economic perspective, local governments should regulate and organize themselves or become a *single player* in investment.

Investment arrangement and policies related to natural resources owned by the region, the regional government and the community must be the priority in enjoying investment because they controlling the production factor. The controlling of the production factors make a decision in the hands of those owns the production factors. The pattern of investment policies adopted in the region to attract investors is very important to sustain regional economic growth. For this reason, local governments must continue to study investment sectors that have comparative advantages to be developed.

Investment is a capital given by individuals or companies or organizations both domestically and abroad.¹⁴ There are various reasons of West Papua province should receive priority development in the future. *The first*, West Papua province has a very large oil and gas content. *The second*, not only oil and gas, it has promising mineral contents such as metal minerals (copper, gold, manganese, aluminum, nickel, cobalt, corum and iron), industrial minerals and class C (construction materials, limestone, marble, asbestos, gypsum and coal). *The third*, West Papua province has vast forest and water resources whose utilization level is still far below its conservation potential. *The fourth*, West Papua province has enormous agricultural and agribusiness development potential. *The fifth*, West Papua province has a large and diverse tourism potential.

All of this can be utilized to improve the peoples' welfare and the regional and national economy by changing its development paradigm. Although, in this region, the development of investment is not as easy as imagined because there are still many obstacles faced. One of the main obstacles causing the slow economic growth in West Papua province is poor investment performance as a result of various problems at each investment stage.

Unfortunately, this situation has caused investors to not be eager to invest in West Papua, both for expanding existing businesses and for new investments. The lack of investment has an effect on economic growth which has been driven more by consumption growth than investment. To date, there are several laws and regulations that have been issued by both the central and regional governments that regulate investment policies in West Papua. Thus, legal certainty is absolutely necessary in the administration of investment in Indonesia.

4. The Alignment of Indigenous Peoples' Rights in the Field of Ideal Investment Arrangements in West Papua

It is important to know that the national development policy in 2005-2025¹⁵ is directed at the achievement of main targets, including the realization of a nation competitiveness to achieve a more prosperous society. The ability of nation to be highly competitive is the key to achieving progress and prosperity of the nation and will make Indonesia ready to face the challenges of globalization and be able to take advantage of existing opportunities.

¹³ Bagir Manan, *Beberapa Masalah Hukum Tatanegara Indonesia*. Bandung: Alumni, 1997.p. 268.

¹⁴ Ermanto Fahamsyah, *Hukum Penanaman Modal, Pengaturan, Pembatasan, Pengaruh Budaya Hukum dan Praktik Penanaman Modal Indonesia*, Yogyakarta: LaksBang PRESSindo, 2015.

¹⁵ Bappenas. Available online at: https://www.bappenas.go.id/files/1814/2057/0437/RPIP_2005-2025.pdf

As an effort to implement investment policies and laws at the regional level, the government has adjusted the laws and regulations to the regional potentials and conditions. The central government has delegated authority for investment administration services to the regional government. For this reason, it is necessary to design an integrated, comprehensive and sustainable investment strategy in all regions of Indonesia.

Regions that must receive priority in the future¹⁶ in efforts to increase national economic productivity and investment activities are the Eastern Indonesia Region (KTI – *Kawasan Indonesia Timur*)¹⁷ because the potency of enormous natural resource. It is known that more than 60 percent of all national natural resources are located in Eastern Indonesia. One of the Eastern Indonesia Regions that has great potential to be developed is West Papua province. Investment activities in West Papua province are very necessary by the policy of accelerating development in this region.

The implementation of investment policies can be done properly without denying the role of the community. Therefore, the approach that can be taken in the context of West Papua province is a concept of *Bottom-up Development Planning*. This concept is implemented based on potential and existing conditions. The existing conditions include natural resources, human resources, capital resources, infrastructure and development facilities, technology, institutions, aspirations of the local community, and others. This concept is needed because West Papua province, besides being a region that is very rich in natural resources, is also supported by the existence of local people who still uphold customary traditions, especially with the implementation of customary rights. It is expected that by this concept, investment policy strategies will be formulated based on the development and management of natural resources based on culture and local potential.¹⁸

Natural resources management and existing local potential requires a large investment budget and cannot only rely on the center. For this reason, good cooperation with investors, both domestic and foreign is highly needed, while still being based on the concept of *Bottom-up Development Planning*, so that the natural resources management and local potential can be implemented properly. And also, synergy is needed among the development actors, includes the local government, investors and local communities.

The synergy between the three stakeholders focuses on: (1) determining investment program priorities based on measurable criteria, (2) supported by community participation to support the implementation of investment programs as a real and directed social empowering. The development of West Papua province is part of national development. By implementing the policy, development in the West Papua province is intended to encourage, empower the community, foster initiatives and increase community participation in order to develop their regions, and improve the peoples' welfare.

¹⁶ The Regional Development Plan and Investment of West Papua Province in 2007-2026, the Development Planning Agency of West Papua province.

¹⁷ The Indonesia Eastern Area consisting of 15 provinces in five main island (Kalimantan, Sulawesi, Nusa Tenggara, Maluku and Papua)

¹⁸ Liani Sari, A. M. Yunus Wahid, Badriyah Rifai, Farida Patittingi. (2017). The Nature of Management Tourism Area to Embody Welfare Society (Tourism Law Perspective), *Journal of Law, Policy and Globalization*, Vol 46.

The implementation of development activities in West Papua province covers various field, one of them is economic development. Regional economic development is a process in which regional governments and communities manage existing resources and form a partnership pattern between local governments, communities and the private sector to create new jobs and stimulate the development of economic activities (*economic growth*) in the region. The development policies and agenda of West Papua province are directed at: development of human resources, natural resources management and the environment, regional accessibility development, balancing growth, effective services, institutional capacity development, economic capacity development, and community capacity development.

In the medium and long-term, policies are directed at improving the quality of infrastructure and facilities of investment development to support regional production and distribution activities. In its implementation, various policies do not give expected results. Many problems are still faced by the business world, such as less-conducive labor regulations, overlapping investment and sector policies, less-conducive security conditions in several certain regions, and lengthy and complicated bureaucratic procedures. This condition is exacerbated by the lack of infrastructure development due to limited government funds. Another thing that needs to be addressed immediately is legal certainty at various levels and the establishment of the Regional Investment Board. Hence, to know whether West Papua province has an advantage as a region that has investment attractiveness compared to other regions in Indonesia and to what extent investment related problems have taken place in West Papua province, it is deemed necessary to conduct a comprehensive study of economic conditions and factors affect the investment climate in West Papua province.

For now, the special autonomy fund will end in 2021, which at this time the government of West Papua province must be able to stand alone with adequate investment wealth management. In the West Papua Special Autonomy Development Planning Deliberation 2019, the Director General of Regional Autonomy emphasized that the Special Autonomy Law needs to be revised, so that there is an *exit strategy* related to Special Autonomy in West Papua, consider that the results of the Special Autonomy have not been felt by Papua indigenous peoples. An interesting note to be underlined is that the distribution of the Special Autonomy funds (as well as additional funds for infrastructure and profit sharing for oil or gas) has provided a driving-force in accelerating the achievement of community welfare.¹⁹ Implicitly, it emphasizes that investment development with profit-sharing mechanisms is a very feasible solution for the development of West Papua. The problem is how this mechanism can be applied based on the recognition and respect for indigenous peoples in West Papua.

As realized that investment activities are always related to the possibility of risks that can result in reduced or even loss of capital value. Therefore, before doing investment, certain factors that can influence it needs to be considered, so that it is expected to be able to produce optimal profits, it can also minimize losses. In the era of seventies, the motivation of foreign investors to invest in various regions was obtaining natural resources and producing from cheaper locations. But in the era of eighties, the motivation for relocation became more important. This is due to the higher production costs.

¹⁹ Akmal Malik, "Kebijakan Pusat Pasca Dana Otsus (2%) Berakhir Tahun 2021", in the Special Autonomy Development Planning Deliberation of West Papua in 2019, Manokwari, 28 May 2019.

More importantly, the transnational companies have globalized, the investors have begun to create production networks between various regions based on natural resources and labor and technology capabilities, with production processes that can be shared between different locations. The created production network is generally the final product that is exported to other countries. This pattern has created a link between trade and investment in various regions and become a demand of the integration process driven by market demands.

Meanwhile, for many years the paradigm adopted by development practitioners in Indonesia express that Indonesia is rich in natural resources and cheap manpower. This paradigm needs to be reformulated to attract investors. Likewise in West Papua province, there is still a paradigm that having abundant natural resources, investors will come. Even though seeing the current global trends, natural resources are not the only major factors that are considered by investors as mentioned above.

Integration between the availability of natural resources, labor, technology capabilities, and production processes between regions is a major factor considered by investors. Considering what is the current global trend which is full of competition, it is very important to conduct an in-depth analysis of the factors that affecting investment and how the integration of these factors has been applied in each region in West Papua province.

Based on the formulation of strategies and investment development in West Papua, it is known that the variable of security has highest portion to consider investing in West Papua. This shows that the conducive and safe atmosphere in business activities is the main factor that must be considered so that investment activities increase in West Papua province.

During the period of 2011 to 2015, the foreign investment in West Papua province tended to increase²⁰ from year to year both in terms of the number of projects and incoming investments. In 2011, the number of projects in West Papua reached 4.342 projects, with an investment of US\$ 19.475 million. In 2012, it increased to 4.579 projects with an investment of US\$ 24.565 million and in 2013 to 9.612 projects with an investment of US\$ 28.618 million. This increase also continued to occur in 2014 which reached 12.632 projects with an investment of 28.529.8 million and in 2015 reached 17.738 projects with an investment value of US\$ 29.275.9 million. In 2015, most of the projects were in the industrial sector with a total of 7.184 projects with an investment of US\$ 11.763.07 million and the lowest.

In fact, the major potency of West Papua province in supporting investment activities is abundant natural resources. For this reason, an integrated natural resource management is needed by involving all stakeholders in investment activities, especially the government, the community, and businesses²¹, so that each investment activity does not conflict with the provisions of environmentally sound development.

The basic concept that is quite important as a basis in the natural resources management is a concept of *Optimum Sustainable Yield* (OSY). By this concept, the amount of natural resources that can be exploited must be based on calculations from various perspectives such as biology, economics, and even socio-political perspectives that develop. This concept reflects the restrictiveness of the government's ability to manage natural

²⁰ *Ibid*

²¹ Irwansyah, W Hakim, A Yunus. (2017). Environmental audit as instrument for environmental protection and management, *The Business & Management Review* 9 (2), 228-232

resources alone. For this reason, it requires the involvement of all parties in formulating the optimum value to be achieved. The results of the decision have adopted the interests of many groups.

Cooperative management or called *co-management* is the division of responsibilities and authority between the government and the community to manage natural resources. In the context of co-management, investment activities in West Papua province are managed together by various interest groups, namely the government, the community and business actors. Integration among various stakeholders in managing natural resources is needed so that the interests of each party can be represented. The Formulation of Investment Development Strategy and Investment Roadmap in West Papua province as an umbrella from the concept of *co-management* that cannot be separated from community-based development. The concept of CBD is based on a pattern of development with bottom-up planning.

The use of this approach is expected to minimize the bureaucratic intervention in development and conceptually is a pattern of bottom-up principle because it involves various interest groups from planning to implementation. Also, by this approach, the grassroots' interests and specifically the traditional indigenous peoples are accommodated. The target as subject of empowerment in the CBDs pattern is a specific community. For example, the subject of the facilities is marine resources in a particular area (i.e *fishing area*), the target subject is forest resources in a forestry area, and so on. Requirements for natural resource management using the cooperative management model to achieve satisfactory results if the management is based on the community.

5. Conclusion

The arrangement of investment policy in West Papua against the recognition and respect for Papua indigenous peoples' rights are still limited to universal policies (UNs General Assembly Resolution 61/295) and are normative in nature. Nationally, the policy has not clearly revealed how the form of recognition and respect for the rights of indigenous peoples and/or Papuan indigenous peoples rights related to the presence of investments in West Papua. On a regional scale, the provincial government policy in the form of regional regulations, only covers the scope of investment in West Papua, but does not fully explain how the form of recognition and respect for Papua indigenous peoples related to investment.

Related with the alignment of Papua indigenous peoples' rights in the field of ideal investment arrangements in West Papua was began with the concept of Bottom-up Development Planning, by involving indigenous peoples as a whole. This concept is based on the *Optimum Suitable Yield* (OSY) where the amount of natural resources that can be exploited must be based on calculations from various perspectives such as biology, economics, and even socio-political perspectives that develop. In addition, it is also made through the concept of profit-sharing that must be in favor of the recognition and respect for the indigenous peoples right. The Provincial government also needs to make regulations regarding the profit-sharing mechanism in the concept of *Optimum Sustainable Yield* (OSY) by emphasizing the principle of recognition and respect for Papua indigenous peoples in term of investment.

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Conflict of Interest Statement:

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